IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT JOHN PRESTON, Appellant.	No. 37314-9-II UNPUBLISHED OPINION

Hunt, J. — Robert John Preston appeals his *Alford*-plea conviction for "failure to remain at injury accident." He argues that the State breached its plea agreement by arguing against his request for a Drug Offender Sentencing Alternative (DOSA) at sentencing. He asks us to remand to a different trial court to allow him to seek his choice of remedy. Holding that the State did not violate or otherwise undercut the terms of its plea agreement with Preston, we affirm his conviction.

FACTS

I. Failure to Remain

On November 3, 2006, Robert Preston was driving a car with two passengers when nearby Pierce County deputies ran a routine check on his license plate and learned that he had an outstanding arrest warrant for a felony weapons violation. After calling for back-up, the deputies turned on their sirens to initiate a traffic stop, but Preston failed to pull over. Instead, Preston turned on his right turn signal and slowed the car, as if he were turning into a parking lot.

But once the deputies turned off their sirens, Preston accelerated away from them. In

pursuit, the deputies (1) traveled 110 miles per hour to keep up with the vehicle, (2) observed Preston speed through a red light at more than 100 miles per hour, (3) watched the car crash near an intersection, and (4) saw Preston run away from the collision scene into surrounding trees and brush.

When the deputies inspected Preston's abandoned vehicle, they saw that one of his passengers, Victor Preston, had crashed through the windshield. The other passenger, Sarah Laval, was yelling for help. Laval told the deputies that Preston (1) knew they were chasing him, (2) said he could "lose them," and (3) fled the collision scene on foot. The Pierce County Sheriff's K-9 unit tracked Preston's path, found him hiding in a nearby shed, arrested him, and advised him of his *Miranda*[1] rights.

II. Procedure

The State charged Preston with (1) one count of attempting to elude a police vehicle, (2) one count of failure to remain at an injury accident site, (3) one count of third degree driving with suspended/revoked license, and (4) two counts of reckless endangerment. The State later amended the information to delete all but the first two charges.

A. *Alford* Plea Bargain

The State offered to drop the remaining charge, attempting to elude a police vehicle, if Preston entered an *Alford*[2] plea to the charge of "failure to remain at injury accident." The State

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (defendant denies guilt but pleads guilty to obtain a lesser penalty).

offered to recommend a sentence of 60 months confinement; the State's plea offer also stated, "Defendant may argue for DOSA."

At the plea hearing, the trial court determined that Preston understood the charge, the applicable sentencing range, and the rights he was waiving. The trial court also found that Preston knew that (1) the crime to which he was entering an *Alford* plea did not disqualify him from a DOSA; (2) the trial court did not have to follow the State's recommended sentence; and (3) if the trial court accepted Preston's plea, he could not withdraw it. The trial court accepted Preston's *Alford* plea and continued the sentencing to allow Preston to undergo DOSA screening.

B. Sentencing

At sentencing, the State requested 60 months confinement. The State also argued against a DOSA sentence, asserting that (1) Preston failed to prove that he had a drug problem; and (2) even if Preston abused drugs, he had failed to show that he sincerely wanted to change his lifestyle. Preston's counsel responded that he had "anticipate[d] the State would object to a DOSA sentence," but neither Preston nor his counsel objected that the State had violated the plea bargain by opposing the DOSA.

The trial court doubted the efficacy of a DOSA for Preston, noting that (1) most of his criminal history included property crimes rather than drug offenses and (2) even if Preston had a drug problem, a DOSA would not solve his criminality. For these reasons, the trial court denied Preston's DOSA request and imposed a standard range sentence of 60 months confinement to run consecutively with a federal sentence on a separate charge.

Preston appeals his conviction. He asks us to remand to a different trial court to allow

him his choice of remedy—withdrawal of his *Alford* plea or specific performance of the plea agreement, which he contends includes a promise by the State not to oppose a DOSA sentence.

ANALYSIS

I. Plea Agreement

Preston argues that the State breached its plea agreement when it argued against his DOSA request because the plea agreement specifically preserved his right to request a DOSA. Br. of Appellant at 6. This argument fails.

A. Standard of Review

Once a trial court accepts a guilty plea, that court may allow withdrawal of the plea only "to correct a manifest injustice." CrR 4.2(f). A manifest injustice is one that is "obvious, directly observable, overt, not obscure." *State v. Osborne*, 102 Wn.2d 87, 97 684 P.2d 683 (1984) (quoting *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). The burden is on the defendant to show a manifest injustice. *Osborne*, 102 Wn.2d at 97. Instances of manifest injustice include the State's breach of the plea agreement. *Taylor*, 83 Wn.2d at 597.

A plea agreement is a contract; thus, basic principles of good faith and fair dealing apply. *State v. Van Buren*, 101 Wn. App. 206, 213, 2 P.3d 991, *review denied*, 142 Wn.2d 1015 (2000). The State must recommend to the trial court the sentence that it promised to recommend in the plea agreement. *Id*. Although the State is not required to make the sentencing recommendation enthusiastically, it cannot undercut the terms of the plea agreement through conduct that indicates an intent to circumvent it. *Id*. The test is whether the prosecutor contradicts, by words or conduct, the State's sentencing recommendation. *Id.* (citing *State v. Jerde*, 93 Wn. App. 774, 780, 970 P.2d 781, *review denied*, 138 Wn.2d 1002 (1999)). In deciding whether the State undercut its plea agreement, we look to the entire sentencing record. *Van Buren*, 101 Wn. App.

at 213 (citing *Jerde*, 93 Wn. App. at 782).

B. No Breach

Preston misreads the language of his plea agreement with the State. This agreement provided only that he "*may argue* for DOSA," (emphasis added), which merely preserved his opportunity to request it. The agreement contains no promise by the State to endorse or to refrain from opposing a DOSA. On the contrary, the State clearly agreed to recommend 60 months confinement, which it did at sentencing.

Unlike the circumstances in *Sledge* and *Van Buren*, the prosecutor here did not argue for any aggravating factors or enhancements to Preston's sentence. Instead, she simply argued against Preston's DOSA request because there was no evidence that he had a drug problem or that he would benefit from a DOSA. Nothing about the prosecutor's argument "contradicts, by words or conduct, the State's sentencing recommendation." *Van Buren*, 101 Wn. App. at 213 (citing *Jerde*, 93 Wn. App. at 780).

Furthermore, looking at the record as a whole, as *Van Buren* requires, we note that Preston fails to show that the State's conduct demonstrated an intent to circumvent the plea agreement. Notably, Preston and his counsel did not object to the State's opposition to his DOSA request; on the contrary, Preston's counsel stated that he had expected the State's objection to a DOSA. Thus, the record shows that Preston and his counsel (1) understood that the plea agreement required the State to recommend only the agreed upon sentence of 60 months confinement and (2) did not view the prosecutor's objections to a DOSA as a breach of the plea agreement.

II. Voluntariness of Plea

Preston also argues that he would not have entered the guilty plea had he known that the State would argue against a DOSA at sentencing. The record fails to support this assertion.

In his statement on plea of guilty, Preston stated that he was accepting the plea bargain to take advantage of the State's offer to reduce the charges because he believed he would be found guilty at trial. Moreover, when the trial court accepted Preston's plea, he acknowledged that he understood he could not withdraw it and that the trial court could impose a sentence different from that recommended in the plea agreement.

Holding that the State did not violate or undercut the terms of its plea agreement with Preston, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, P.J.

Quinn-Brintnall, J.